GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL

September 12, 2005

OPINION OF THE ATTORNEY GENERAL

SUBJECT: National Capital Revitalization Corporation ("NCRC") and its Subsidiaries

Honorable Anthony A. Williams
Mayor of the District of Columbia
1350 Pennsylvania Avenue, N.W., 6th Floor
Washington, D.C. 20004

Dear Mayor Williams:

This opinion, which is issued pursuant to Reorganization Order No. 50 of 1953, as amended, and which is the guiding statement of law to be followed by all District employees in the performance of their official duties, in the absence of specific action by the Mayor or the Council, or until overruled by controlling court decision, addresses these questions:

1. Is the NCRC part of the District of Columbia Government (the "District")?

2. Is NCRC subject to

   a) the federal Anti-Deficiency Act; or
   b) the District's Anti-Deficiency Act?[1]

3. Is NCRC statutorily authorized to borrow money from a private commercial bank, execute a non-recourse note and secure that note with a deed of trust encumbering two of its properties? And, if yes, is it nevertheless prohibited from doing so under either Anti-Deficiency Act? Furthermore, assuming that NCRC may borrow money from private commercial banks, is NCRC

[1] District of Columbia Anti-Deficiency Act of 2002, effective April 4, 2003 (D.C. Law 14-285; D.C. Official Code § 47-355.01 *et seq.* (2004 Supp.)) (hereinafter "D.C. Anti-Deficiency Act" or "D.C. ADA"). For purposes of this Memorandum, all references to the provisions of the D.C. Anti-Deficiency Act will be to the D.C. Official Code.

authorized to establish special funds to use as collateral for loans from such banks? And finally, is NCRC authorized to exercise exclusive accounting control over its funds?

BACKGROUND

The questions presented arise out of the following circumstances. NCRC received assignment of numerous property interests (in many cases, properties in Southwest D.C. that were encumbered with long-term ground leases on terms highly favorable to the ground tenants) from the Redevelopment Land Agency ("RLA") at the time the RLA was dissolved. Most of these property interests were transferred by NCRC to its land-holding subsidiary, the RLA Revitalization Corporation ("RLARC"). Some of the NCRC property interests and some RLARC properties encumbered by ground leases are to be transferred to the newly-formed Anacostia Waterfront Corporation ("AWC") for the purpose of redevelopment under the Anacostia Waterfront Initiative. In the course of negotiations regarding the transfer of assets to take place among the District, AWC, NCRC and RLARC, NCRC disclosed that it had borrowed $6,700,000 from the Bank of America. N.A. (the "Bank") in September 2002, and secured that loan with some of its property holdings, including the revenues generated by two ground leases held by NCRC. The two ground leases are referred to herein as the "Waterfront Property." NCRC signed a limited recourse promissory note titled "Promissory Note Secured by Security Instrument" on September 10, 2002 (the "Note"). The promissory note was secured by a Leasehold Deed of Trust, also dated September 10, 2002, and recorded in the land records as Document No. 2002104179 (the "Deed of Trust"). We have been advised that $5,000,000 of the loan proceeds were used to purchase the interests of the tenant in one of the ground leases that makes up the Waterfront Property (presumably so that NCRC could lease to another tenant who would redevelop the property and lease the ground on more favorable terms) and the remaining proceeds were used for other capital projects of the NCRC. We do not have any written documentation verifying the use of the loan proceeds.

DISCUSSION

I. NCRC IS PART OF THE DISTRICT GOVERNMENT

The NCRC is a statutorily created instrumentality of the District government created by the Council of the District of Columbia (the "Council"), and it is a governmental unit contemplated by the District of Columbia Home Rule Act ("Home Rule Act"), approved December 24, 1973 (87 Stat. 777; D.C. Official Code § 1-201.01 *et seq.* (2001)).

A. The NCRC Statute

The National Capital Revitalization Corporation Act of 1998, effective September 11, 1998 (D.C. Law 12-144; D.C. Official Code § 2-1219.01 *et seq.* (2001)) ("NCRC Statute")[2] created NCRC as a body corporate and an independent instrumentality of the District, with a legal existence separate from that of the District government.[3] NCRC is to retain and expand

[2] For purposes of this Memorandum, all references to the provisions of the NCRC Statute will be to the D.C. Official Code (2001).

[3] *See* D.C. Code § 2-1219.02(a).

businesses located in the District, to attract new businesses to the District, to induce economic development and job creation in the District, to provide incentives and assistance, to remove slum and blight, and to coordinate the District's efforts to achieve these purposes.[4]

B. Authority of the District Government to Create an "Independent Instrumentality of the District"

The District's government was created as a municipal corporation and:

> is constituted a body corporate for municipal purposes, and may contract and be contracted with, sue and be sued, plead and be impleaded, have a seal, and exercise all other powers of a municipal corporation not inconsistent with the Constitution and laws of the United States and the provisions of this Code.[5]

The Home Rule Act established a charter for the District which provides for the District's current means of governance and delegates certain legislative powers to the District. The Home Rule Act serves as an enabling act, determining what the District, through its three branches of government, can and cannot do. Section 404 of the Home Rule Act delegates certain legislative powers to the Council. Among those powers, as set out in section 404(b), D.C. Official Code § 1-204.04(b) (2001), is the Council's power to:

> create, abolish, or organize, any office, agency, department, or **instrumentality** of the government of the District and to define the powers and duties, and responsibilities of any such office, agency, department, or **instrumentality**. (Emphasis supplied.)

The Council clearly has the authority under the Home Rule Act to create an instrumentality of the District government and define its powers, duties and responsibilities. However, the Council can only create an entity outside of the District government if the Council is expressly granted the power to do that by Congress.

The typical municipal corporation is subject to Dillon's Rule, which means it can exercise only those powers: (1) granted in express words; (2) necessarily or fairly implied in or incident to the powers expressly granted; and (3) essential to the declared objects and purposes of the municipal corporation – not simply convenient, but indispensable. The Rule takes its name from an opinion of John F. Dillon in 1868, a federal circuit judge, chief justice of the Iowa Supreme Court, and noted law professor. *See* Dillon on Mun. Corp. (3rd ed.), sec. 89. Dillon's Rule applied to all agencies and instrumentalities of the District government before the 1975 home rule District government, as well, because the pre-home rule government was only a government of specifically delineated executive and quasi-legislative powers. By contrast, the home rule government is virtually the opposite: a tri-partite government patterned after the federal one, *see, e.g., Wilson v. Kelly,* 615 A.2d 229, 231 (D.C. 1992), with broadly-delegated executive and

---

[4] D.C. Code § 2-1219.02(b).

[5] Section 1 of An Act to Provide a Government for the District of Columbia, approved February 21, 1871 (16 Stat. 419; D.C. Official Code § 1-102) (2001)).

legislative powers, subject only to such specific limitations of those powers as are contained in the Home Rule Act. Instead of the typical "limitation of power charter" under Dillon's Rule, the District has a classic "grant of power charter."

However, the conclusion that Dillon's Rule does not apply to the current District government does not mean that the government's broad legislative power embraces the creation of entities outside the government. This is true because of the provision already quoted in section 404(b) of the Home Rule Act, which authorizes the Council to create any office, agency, department, or instrumentality "of the government of the District." By its terms, this provision does not authorize the Council to create any entity outside or otherwise not "of" the government. Under the well-settled rule of statutory construction known as *expressio unius est exclusio alterius* (which means that the express provision of one thing should be understood as the exclusion of other related things), *see, e.g., Shook v. District of Columbia Financial Responsibility and Management Assistance Authority,* 132 F.3d 775, 782 (D.C. Cir. 1998); 2A *Sutherland Statutory Construction,* § 47.23, pp. 216-17 (5th ed. 1992), citing *inter alia National Rifle Association v. Potter,* 628 F. Supp. 903, 909 (D.D.C. 1986), and *McCray v. McGee,* 504 A.2d 1128, 1130 (D.C. 1986), section 404(b) of the Home Rule Act should be read as a limitation on the Council's powers regarding the creation of the entities it describes. While the *Shook* decision on pp. 782-83 cautions against using the *expressio* rule to create a negative inference from legislative language that is merely intended to clarify what might otherwise be doubtful, in this case – under section 404(b) – such an inference is proper because there could be no doubt regarding the Council's power to create new entities of the government, and Congress' failure to also provide expressly for the Council's power to create extra-governmental entities cannot reasonably be viewed as a mere oversight. Congress' failure to include such a power in light of its mention of the power to create government entities must be accorded significance. Hence, the District's Charter limits the Council to the creation of entities that are part of the District government.

Absent an act of Congress (not just a Council act that has sat before Congress for passive review), the District cannot create any office, agency, department, or other instrumentality that is outside the District government. Construing the NCRC Statute to the maximum extent of the Council's powers, the description of the NCRC as "an independent instrumentality of the District, with a legal existence separate from that of the District government" – standard boilerplate that appears in most of the enabling laws for the District's independent agencies – means that the NCRC, while still a part of the District government, is nevertheless independent and separate from all other government entities, including the Executive Office of the Mayor.[6]

---

[6] The legislative history of the NCRC statute reflects the Council's intent that the NCRC remain part of the government, notwithstanding the statutory phrase, "with a legal existence separate from that of the District government." The Report of the Committee on Economic Development to the Council dated February 13, 1998 (the "Report") reflects a vision of NCRC as a public entity that would harness the talent, capital and drive of the private sector and focus those assets on resolving many of the social ills and physical deterioration plaguing the District through a coordinated economic development strategy. The Report characterized the to-be-formed NCRC as "a business development instrumentality of the District government" and "an independent public instrumentality." *See* Report at p.3. The legislative history also reflects the Council's knowledge and understanding that the NCRC would be a public entity that would be part of the District government. This point is made repeatedly throughout the legislative history, in statements like "...the bill provides to the [NCRC] an array of governmental instrumentality powers, including the condemnation of property under existing D.C. laws and procedures...", *see* Report at p.3, and "[t]he powers conferred by this act are for public uses and purposes for which public powers may be employed, public funds may be expended, and the power of eminent domain and the police power may be exercised, and the

C. NCRC as an Instrumentality of the District Government

The foregoing analysis makes it clear that the District's instrumentalities, including NCRC, are part of its government. This conclusion is reinforced by the definition of "District instrumentality" in section 490(n) of the Home Rule Act, D.C. Official Code § 1-204.90(n) (2001), which means "any agency or instrumentality (including an independent agency or instrumentality), authority, commission, board, department, division, office, body, or officer of the District of Columbia government duly established by an act of the Council or by the laws of the United States, whether established before or after August 5, 1997." Additionally, NCRC's enabling statute expressly reserves substantial control and oversight of its activities to the Council. The list of areas where the Council reserved its ability to control NCRC includes:

1. Council Review of Board of Director Nominees;[7]
2. Council Review of all disposition of real property;[8]
3. Council review of NCRC's adoption of written guidelines or rules and procedures pertaining to:

    a. Gifts, grants, or subsidies;
    b. Procurement of goods and services; and
    c. Disposition of Property;[9]

4. Council review of any revitalization plan;[10]
5. Council review of the creation of any subsidiary;[11]
6. Council review of the public purpose of any bond undertaking;[12]
7. Council review of any exercise of the power of eminent domain; [13] and

---

granting of such powers is necessary and in the public interest." *See* Report at p.5. Given this legislative history, a court likely would not give any effect to the statutory phrase, "with a legal existence separate from that of the District government," even if the Council had the power to create an entity outside the government. *See, e.g., Dyer v. D.C. Department of Housing,* 452 A.2d 968, 969-70 (D.C. 1982).

Moreover, even if the legislative history were not so clear, because the Council lacks that power to create an entity outside the government, the general rule of severability would apply to strike a broad interpretation of the statutory phrase, "with a legal existence separate from that of the District government." The general rule of severability is contained in D.C. Official Code § 45-201 (2001), which in relevant part states that "if any provision of any act of the Council of the District of Columbia or the application thereof to any person or circumstance is . . . beyond the statutory authority of the Council of the District of Columbia, or otherwise invalid, the . . .invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of each act of the Council of the District of Columbia are deemed severable."

[7] D.C. Official Code § 2-1219.03.
[8] D.C. Official Code § 2-1219.07.
[9] D.C. Official Code § 2-1219.10.
[10] D.C. Official Code § 2-1219.12.
[11] D.C. Official Code § 2-1219.16.
[12] D.C. Official Code § 2-1219.18.
[13] D.C. Official Code § 2-1219.19.

8. Reservation of title to all NCRC property in the District upon the corporation's dissolution.[14]

Of course the ultimate reservation of control over NCRC is the Council's Charter authority under Section 404 of the Home Rule Act to create, abolish, or organize any department, agency or instrumentality. It is not reasonable to interpret the Council's authority to extend to the creation of the NCRC, but not its abolition (which the Council might not have authority to do if NCRC were outside of the District government). Aside from the Charter limitation on the Council's power to create extra-governmental entities, the Council's reservation of the degree of control listed above is inconsistent with a conclusion that the Council intended the NCRC, as an instrumentality of the District, to be outside the District government. Rather, the NCRC statute reflects a clear intent of Council that the NCRC be part of the District government.[15] This conclusion is supported by the statute's legislative history, as described earlier.

This conclusion is further supported by the observation that, were the NCRC a completely independent, non-governmental body, and thus not subject to the laws that apply to the District as a government, then the federal tax-exemption of bonds issued by NCRC might be questioned by the Internal Revenue Service. Despite numerous changes to the federal Internal Revenue Code, it has been a constant that tax-exempt bonds must be direct or collateral obligations of: (1) a state; (2) a political subdivision of a state; (3) a constituted authority with the right to issue obligations on behalf of a state or a political subdivision; (4) certain types of special assessment districts; or (5) certain types of quasi-public corporations qualified under the Internal Revenue Code or the implementing regulations. Generally, a political subdivision is a division of a state or local government unit which has been delegated the right to exercise part of the sovereign powers of that unit. Sovereign powers include eminent domain, taxing powers and police powers. However, because NCRC has the authority to issue bonds derived from Section 490 of the Home Rule Act, and because NCRC has eminent domain powers, among others, under the tax-exempt bond requirements established by federal law, NCRC would be hard-pressed, indeed foolhardy, to assert that it is not a duly-constituted entity of the District government.

II. NCRC IS SUBJECT TO THE ANTI-DEFICIENCY ACTS

The District government is subject to two anti-deficiency acts: (1) the federal Anti-Deficiency Act, 31 U.S.C. §§ 1341, 1342, 1349-1351 1511-1519 (2004) (the "Federal ADA"), and D.C. Official Code §§ 1-206.03(e) and 47-105 (2001); and (2) the District of Columbia Anti-Deficiency Act, D.C. Official Code §§ 47-355.01 – 355.08 (2004 Supp.) (the "D.C. ADA" and together with the Federal ADA, the "Anti-Deficiency Acts"). Generally, the Anti-Deficiency Acts are intended to prevent federal and District government employees from (1) (a) making or authorizing an expenditure or obligation that exceeds an amount available in an appropriation or fund for the expenditure or obligation, or (b) involving either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law; and (2) accepting

[14] D.C. Official Code § 2-1219.28.

[15] We note there is recent case law that the D.C. Water and Sewer Authority (WASA) is not entitled to the protections afforded the District government under D.C. Official Code §§ 12-301 and 12-309 (statute of limitations and statutory pre-suit notice). *See* D.C. *Water and Sewer Authority v. Hampton & Assocs.*, 851 A.2d 410 (D.C. 2004); and *Dingwall v. D.C. Water and Sewer Authority*, 800 A.2d 686 (D.C. 2002). However, those rulings do not stand for the proposition that WASA is not part of the District government for all purposes.

voluntary services for either government or employing personal services exceeding that authorized by law in the absence of an agreement setting forth the cost and method of payment, if any, for such services.

A. The Federal Anti-Deficiency Act

The Federal ADA applies to federal agencies and the District government and ensures that, before a public official obligates the government to spend money, the funds are available and appropriated for the purpose for which they are obligated. The Federal ADA was intended to keep an agency's level of operations within the amounts Congress appropriates for that purpose. *See* the General Accounting Office's *Principles of Federal Appropriations Law*, Vol. II (2nd ed. 1992) at 6-56 .

The two basic prongs of the Federal ADA are:

1. 31 U.S.C. § 1341(a): prohibiting both federal and District government employees from (a) making or authorizing an expenditure or obligation that exceeds an amount available in an appropriation or fund for the expenditure or obligation, or (b) involving either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law; and

2. 31 U.S.C. § 1342: prohibiting any officer or employee of the federal or District governments from accepting voluntary services outside of the authorized procurement process for either government or employing personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property. This provision is intended to prevent a government officer from accepting unauthorized services not intended or agreed to be gratuitous and therefore likely to afford a basis for a future claim upon Congress. 30 Op. Atty. Gen. 51 (1913). This rule is supported by the rationale that, if an agency cannot directly obligate in excess or advance of its appropriations, it should not be able to accomplish the same thing indirectly by accepting ostensibly "voluntary" services and then presenting Congress with the bill – a strategy referred to as "coercive deficiency."

As part of the District government, the NCRC is subject to the Federal ADA until such time as Congress enacts a statute exempting it from the appropriations process or the Federal ADA itself.

B. The D.C. Anti-Deficiency Act ("D.C. ADA")

The D.C. ADA expressly applies to any of the following: "a District agency head, deputy agency head, agency chief financial officer, agency budget director, agency controller, manager, or other employee." See D.C. Official Code § 47-355.01 (2001). In addition, the D.C. ADA expressly defines the term "Agency" to include an "**instrumentality of the District Government.**"[16]

Much like the Federal ADA, any person to whom the D.C. ADA is made applicable may

[16] D.C. Official Code § 47-355.01 (1) (emphasis added).

not:

1. Make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund;

2. Involve the District in a contract or obligation for the payment of money before an appropriation is made unless authorized by law;

3. Approve a disbursement without appropriate authorization; or

4. Defer recording a transaction incurred in the current fiscal year to a future fiscal year.[17]

The D.C. ADA imposes a series of reporting requirements and includes several violations over and above those contained in the Federal ADA: (1) knowingly reporting incorrectly on spending to date or on projected total annual spending; and (2) failing to adhere to a spending plan.[18] In addition, the District created a Board of Review for Anti-Deficiency Violations to ascertain the culpability of the employees responsible for violations of the D.C. ADA and to recommend appropriate disciplinary actions, which may include termination of employment. The Board is to report to the Council regarding each violation and the actions taken or proposed to be taken as a result.

NCRC is, by its express terms, subject to the provisions of the D.C. ADA. Moreover, the Council has not statutorily modified the D.C. ADA to exempt or exclude any District agency or instrumentality, including NCRC. Indeed, Council recently made amendments to the NCRC Statute without including any exemption from the D.C. ADA.[19]

C. The Anti-Deficiency Acts and Section 446 Exemptions

Borrowing money, which then must be repaid with interest and other fees, is inherently contradictory to the purposes and application of both Anti-Deficiency Acts.

Congress recognized this contradiction, and also the importance to the District government of borrowing funds from either private lenders or the public markets for certain purposes, and therefore, created certain exceptions to the application of the Federal ADA in the Home Rule Act to authorize such borrowing. These exceptions are, for the most part, set forth in section 446 of the Home Rule Act (codified at D.C. Official Code § 1-204.46 (2001)). They are:

1. Obligations or expenditures of excess revenues of Water and Sewer Authority for capital projects;[20]
2. Obligations or expenditures of District revenues to secure general obligation bonds or

[17] D.C. Official Code § 47-355.02.
[18] D.C. Official Code § 47-355.06 (2004 Supp.).
[19] *See* Section 233 of FY 2004 Budget Support of 2003, effective November 13, 2003 (D.C. Law 15-39; D.C. Official Code 2-1219.01 *passim* (2004 Supp.)).
[20] D.C. Code § 1-204.45a(b).

notes;[21]

3. Obligations or expenditures for the payment of principal of, interest on, or redemption premium for general obligation notes;[22]
4. Obligations or expenditures for payment of principal of, interest on, or redemption premium for revenue anticipation notes;[23]
5. Obligations or expenditures for payment of principal of, interest on, or redemption premium for bond anticipation notes;[24]
6. Amounts set aside in a debt service fund under section 481(a); amounts obligated or expended for the payment of principal of, interest on, or redemption premium for any general obligation bond or note issued under sections 461(a), 471(a), or 472(a); amounts obligated or expended as provided by the Council in any annual budget (or amendment or supplement thereto) for the District pursuant to section 483(a); or any amount obligated or expended pursuant to section 483(b) (for debt service on general obligation bonds);[25] and
7. Revenue bonds and other obligations (issued by the District, Water and Sewer Authority, or District of Columbia Tobacco Settlement Financing Corporation).[26]

Congress further recognized that certain instrumentalities, such as the Water and Sewer Authority, would need similar borrowing powers, and therefore, both authorized specific entities to exercise such borrowing authority and authorized the Council to delegate certain borrowing authority powers to District instrumentalities in the future. *See, e.g.*, D.C. Official Code §1-204.90(6)(A) (2001) ("The Council may by act delegate to any District instrumentality the authority of the Council under subsection (a)(1) of this section to issue taxable or tax-exempt revenue bonds, notes or other obligations to borrow money for the purposes specified in this subsection.").

Because section 446 of the Home Rule Act governs the process by which the District obtains appropriated funds, an exemption from section 446 of the Home Rule Act effectively functions to exempt an activity, obligation or expenditure (depending on the nature of the exemption) from the Anti-Deficiency Acts.[27] Therefore, an exemption from section 446 means that funds used for

---

[21] D.C. Code § 1-204.67(d).
[22] D.C. Code § 1-204.71(c).
[23] D.C. Code § 1-204.72(d)(2).
[24] D.C. Code § 1-204.75(e)(2).
[25] D.C. Code § 1-204.83(d).
[26] D.C. Code §§ 1-204.90(f), (g), (h)(3), and (i)(3).
[27] Section 446 of the Home Rule Act obligates the District to submit its annual budgets to Congress for approval and specifies that, except as provided in certain sections of the D.C. Official Code, "no amount may be obligated or expended by any officer or employee of the District of Columbia government unless such amount has been approved by Act of Congress, and then only according to such Act." This is the "appropriations requirement." As stated above, the Federal ADA prohibits the making or authorizing of an expenditure or obligation that exceeds an amount available in an appropriation or fund for the expenditure or obligation or involving the government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law. Thus, if no appropriation is required, there can be no violation of the appropriations requirement in the Federal ADA.

The exemptions from Section 446 of the Home Rule Act also apply to the D.C. ADA. If the D.C. ADA were construed to make unlawful – albeit under local, not federal, law – the very same conduct that section 490 expressly makes lawful, there would be a conflict in which the enforcement of local law would frustrate congressional intent. Since section 602(a) of the Home Rule Act prohibits the Council from passing any act contrary to the Home Rule

the enumerated exemptions are not subject to the appropriations process authorized by Congress, and further, that obligations and expenditures of the monies so exempted are not subject to limitation by the appropriations process.

Notwithstanding the foregoing, depending on the circumstances, funds that are appropriated by Congress for specific purposes must be spent in accordance with such purposes and may not be available for expenditure for the exempt purposes specified in section 446. Appropriated funds cannot generally be diverted for such exempt uses (unless expressly authorized by Congress) because doing so would frustrate the express directive of Congress to use appropriated funds in the manner specified. However, the exemptions under section 446 of the Home Rule Act permit the District to use certain revenue streams that it creates or receives outside of the appropriations process without restriction by appropriation laws. Section 490(f) of the Home Rule Act is one such exemption. It permits the District to pledge certain District assets to secure revenue bonds that it issues, and to use the proceeds of such revenue bonds, without going through the normal budgeting and appropriations process so long as the District pledges such assets and uses such proceeds in accordance with the requirements of the exemption in section 490.[28]

Subsection (f) of section 490 of the Home Rule Act (which is exempted from the budgeting and appropriations process under section 446 of the Home Rule Act) states:

> (f) The fourth sentence of [Section 446] shall not apply to:
>
> > (1) Any amount (including the amount of any accrued interest or premium) obligated or expended from the proceeds of the sale of any revenue bond, note or other obligations issued under subsection (a)(1) of this section;
> >
> > (2) Any amount obligated or expended for the payment of the principal of, interest on, or any premium for any revenue bond, note or other obligation issued under subsection (a)(1) of this section;
> >
> > (3) Any amount obligated or expended pursuant to provisions made to secure any revenue bond, note or other obligations issued under subsection (a)(1) of this section; and
> >
> > (4) Any amount obligated or expended pursuant to commitments made in connection with the issuance of revenue bonds, notes or other obligations for repair, maintenance, and capital improvements relating to undertakings

---

Act, the D.C. ADA would be void if it were construed to limit powers of the District in ways that Congress expressly granted to it. Under the rule of statutory construction that a statute should be construed so as to make it lawful, the D.C. ADA should be construed as not prohibiting expenditures and obligations that Congress expressly permitted under the exceptions to section 446 of the Home Rule Act.

[28] One such requirement is that the Council must authorize the issuance of any revenue bond by act or resolution, *see* D.C. Official Code § 1-204.90(a)(1) (2001), and that when the District issues a revenue bond on behalf of itself (or any governmental person), such authorization must be by act of the Council, *see* D.C. Official Code § 1-204.90(k), in contrast to authorization by resolution for a bond that is to be repaid by any "nongovernmental persons."

financed through any revenue bond, note or other obligation issued under subsection (a)(1) of this section.

III. AN NCRC NOTE IS ONLY VALID IF A REVENUE BOND, BUT IT MUST BE MADE TO CONFORM TO STATUTORY REQUIREMENTS AND RATIFIED BY ACT OF THE COUNCIL

A. NCRC Borrowing Authority Does Not Derive from D.C. Official Code § 2-1219.15(31)

The Council created NCRC through the NCRC Statute. As noted above, the NCRC Statute established the NCRC as a body corporate and as an instrumentality of the District, but with a legal existence purportedly separate from the District. The specific powers of the NCRC are enumerated in D.C. Official Code § 2-1219.15(1)-(31). Among these powers are (1) the power to issue revenue bonds pursuant to authority delegated by the Council in D.C. Official Code § 2-1219.18 and (2) the authority to encumber NCRC's property to secure such revenue bonds. There is, however, no general authority to borrow money.[29]

While subsection (31) of D.C. Official Code § 2-1219.15 states that the NCRC has the authority of a corporation under the Business Corporation Act of the District, this authority is limited by the qualification that the exercise of such power may not be inconsistent with applicable federal or District law or the purposes of the law creating the NCRC. It is my opinion that this qualification places a substantial limitation on the authority conveyed by this provision. Furthermore, I interpret subsection (31)'s broad language as merely a "savings" provision designed to provide requisite and corollary authority necessary to exercise the powers otherwise given to the NCRC in the preceding subsections (1) through (30) of D.C. Official Code § 2-1219.15. I do not interpret subsection (31) to have imbued NCRC with all of the powers of private corporations created under the Business Corporation Act. An interpretation of subsection (31) that would allow NCRC to act like a private business corporation would render the enumeration of the 30 specific powers preceding subsection (31) meaningless. In addition, as part of the District government, the NCRC cannot behave like just another business corporation. It is specifically designated as an instrumentality of the District government with powers of government that an ordinary business corporation does not possess, such as the power of eminent domain and the power to issue tax exempt debt. Therefore, I believe subsection (31) grants no general borrowing authority, but rather that the borrowing authority of the NCRC is limited to that specified in D.C. Official Code §§ 2-1219.18 and 2-1219.23, and NCRC does not have the power to borrow money other than in accordance with those provisions.

Finally, if NCRC were to be considered completely independent of the District government (as if it were a business corporation created by the District government in much the same way as the Congress charters private corporations which are not part of the federal government), it might be required to register its securities offerings with the federal Securities and Exchange Commission,

---

[29] The Council could not delegate a general authority to borrow money to NCRC, since such a delegation would frustrate the language and purposes of the Home Rule Act, which grants only certain enumerated rights to the District to borrow money. *See* discussion *supra* at 4 regarding the application of *expressio unius est exclusio alterius* rule in the context of the Home Rule Act.

unless it could find another exemption (*i.e.*, as a non-profit organization). Generally, securities issued or guaranteed as to principal or interest by the District, or by any public instrumentality of the District, or any industrial development bond, the interest of which is excludable from gross income under the Internal Revenue Code, are exempt from most of the requirements of the federal securities laws, including the registration requirements.[30]

B. NCRC has Authority to Issue Revenue Bonds with Council Approval

Section 490 of the Home Rule Act authorizes the District to issue "revenue bonds, notes or other obligations" in order to finance, refinance or reimburse or assist in the financing, refinancing or reimbursement of capital projects and other undertakings of the District or any instrumentality of the District. The term "revenue bonds, notes or other obligations" is broadly defined in subsection (n)(1) of section 490 to include any obligation used to borrow money to finance any purpose referred to in subsection (a)(1) of section 490, which is secured as provided in section 490 and which does not obligate the full faith and credit of the District. The term "revenue bonds" is used in this memorandum to reflect this definition. Subsection (a)(1) of section 490 specifies a long list of capital projects for which the District may issue revenue bonds. These projects include those that contribute to the economic development of the District. Subsection (a) (3) of section 490 authorizes the District to pledge property as security for any authorized revenue bonds. Subsection (a)(6) of section 490 authorizes the Council to delegate its authority under section 490(a)(1) to issue taxable or tax-exempt revenue bonds to any District instrumentality by statute. The Council has delegated this authority to NCRC in D.C. Official Code § 2-1219.18.

The Council's delegation of authority to issue revenue bonds is found in D.C. Official Code § 2-1219.18, which permits the NCRC Board to authorize the issuance of revenue bonds (a power otherwise reserved to the Council), while the Council retains only the right to approve by resolution the project being financed. The NCRC Statute further requires the Council to approve or disapprove of any proposed project within 45 days after a resolution in support of a proposed project. *See* D.C. Official Code § 2-1219.18(b)(1).[31] Notwithstanding the language of the NCRC Statute, however, such language is inconsistent with the mandate of section 490(k) of the Home Rule Act, which requires borrowing on behalf of a governmental entity to be approved by an act passed by Council, rather than a resolution. The distinction created by section 490(k) in the event of government borrowing is fundamental because an act passed by Council gives Congress the opportunity to review projected borrowing by the District government on its own behalf during the normal congressional layover period required for the passage of an act of the Council; whereas a resolution does not provide this opportunity. This additional layer of congressional review where the District is borrowing to fund its own activities provides a level of accountability that is not necessary when the District is borrowing to fund third-party projects.

---

[30] *See* Securities Act of 1933 (15 U.S.C. § 77a *et seq.*); Securities Exchange Act of 1934 (15 U.S.C. § 78a *et seq.*).

[31] *See also* section 490 of the Home Rule Act (D.C. Official Code § 1-204.90(a)(6)(B)): "Revenue bonds, notes or other obligations issued by a District instrumentality under a delegation of authority described in subparagraph (A) of this paragraph shall be issued by resolution of that instrumentality, and any such resolution shall not be considered to be an act of the Council." Although this section states that the instrumentality shall pass a resolution authorizing the issuance of the bonds, it is not inconsistent with the requirement that the Council then authorize such bonds by statute. Both are necessary in order to give effect to all provisions of section 490 of the Home Rule Act.

With regard to the present question, as I understand the situation, the NCRC borrowed $6,700,000 from the Bank in September 2002. In this instance, the NCRC not only failed to comply with the requirement of section 490(k) of the Home Rule Act but also failed (i) to meet all the technical requirements for a revenue bond required by statute, and (ii) to introduce approval resolutions for NCRC revenue bonds as required by the NCRC Statute and described in more detail below. My staff has reviewed the Note and, in substance, the Note could be construed as a revenue bond as defined in District law, but it does not due to these failures.

Before a revenue bond may be authorized under the NCRC Statute, the NCRC must satisfy certain requirements set forth under D.C. Official Code § 2-1219.18, the material provisions of which are:

1. NCRC's Board must approve by resolution the issuance of the bond (requires an affirmative vote of the majority of the NCRC Board). *See* D.C. Official Code § 2-1219.18(b)(1). The Board, in its resolution, shall provide for the available revenues to be pledged to secure the bonds. *See* D.C. Official Code § 2-1219.18(g).
2. The bond must fund a project eligible under section 490(a)(1) of the Home Rule Act in furtherance of NCRC's established statutory purposes. *See* D.C. Official Code § 2-1219.18(a).
3. Bond proceeds may not be used to make monetary grants. *Id.*
4. NCRC must submit to the Council a resolution of project approval accompanied by a summary description of the proposed project and a listing of the public purpose benefits to be derived from the proposed undertaking for a 45-day period of Council review. The Council must approve or disapprove a proposed project by resolution within such 45-day period. *See* D.C. Official Code § 2-1219.18(b)(1).
5. Bonds of NCRC shall not constitute an indebtedness of the District and are not general obligations of the District, nor are they secured by a pledge of the full faith and credit of the District. Any revenue bond issued by NCRC must contain a statement setting forth these limitations. *See* D.C. Official Code § 2-1219.18(p).

Based on statements made by NCRC, I believe the loan proceeds have been spent in accordance with purposes permitted under section 490(a) of the Home Rule Act. However, a number of the other requirements under D.C. Official Code § 2-1219.18 have not been satisfied.

The Note is a limited recourse promissory note to NCRC, which means that, in most circumstances, the Note is secured only by the collateral referenced in the Deed of Trust. Any revenue bond can only be secured by a limited set of assets that are not already appropriated for a particular purpose because a revenue bond can neither interfere with an existing appropriation law nor become a general obligation of the governmental entity issuing such bond (and therefore must be secured by designated revenues or other assets that are not subject to a prior appropriation). *See* section 490(c) of the Home Rule Act: "Any and all such revenue bonds, notes or other obligations issued under subsection (a)(1) of this section shall not be general obligations of the District, shall not be a pledge of or involve the faith and credit or taxing power of the District (other than with respect to any dedicated taxes) and shall not constitute a debt of the District, and shall not constitute lending of the public credit for private undertakings for purposes of section 602(a)(2) of this Act." However, two aspects of the Note are problematic as

material terms because they do not place required limits on NCRC liability under the Note. These aspects are (1) the potential for recourse liability and (2) the uncapped environmental indemnities, default interest rates, fee-shifting provisions, and cost-shifting provisions.

1. Potential for Recourse Liability. The Deed of Trust secures collateral that, for the most part, is composed of the Waterfront Property ground leases, the improvements thereon, the fixtures thereon, and all contractual rights pertaining to real property interests of NCRC in the Waterfront Property; however, the Deed of Trust also includes as collateral NCRC bank accounts, development rights, insurance policies, books and records, and many other items that are either collaterally or tangentially related to the Waterfront Property (and may include appropriated funds or assets). However, assuming *arguendo* that the scope of the secured interest in NCRC's Waterfront Property under the non-recourse provision does not violate the Anti-Deficiency Acts, the Note also provides for the *voidability* of the non-recourse provision: that is, if NCRC attempts to delay a foreclosure by the Bank or claims that any Loan Document (as defined in the Note) is invalid, the Note becomes fully recourse to NCRC; in such an event, the Bank could proceed against any and all of NCRC's assets, whether or not connected to the Waterfront Property. Furthermore, there is no express statement in the Note that under no circumstances shall any obligation of NCRC under the Note be deemed an obligation of the District of Columbia.

2. Uncapped Environmental Indemnities, Default Interest Rates, Fee-Shifting Provisions, and Cost-Shifting Provisions. Certain types of costs that are unpredictable or indeterminable cannot be part of a revenue bond if generally included as a secured cost without a cap on such costs. Such uncapped, unpredictable and potentially enormous costs cannot be imposed upon the District as part of a revenue bond since a revenue bond can only be secured by a limited pool of assets that usually must be expressly stated as part of the authorization of the issuance of the bond. Such pool of assets is necessarily finite, and presumably of a smaller value than the amount of the loan plus these unknown costs. Furthermore, the absence of a cap on liability effectively creates a general obligation of the District, which is impermissible in the context of revenue bonds. *See* discussion *supra*.

In this context, among other things: (1) I have been informed that the proposed project for which the bonds were issued was not submitted to the Council for authorization or approval; (2) I do not have evidence that the NCRC Board reviewed and approved the Note as a revenue bond; and (3) certain technical requirements regarding express statements on revenue bonds were not followed, including without limitation the requirements of subsection (p) of D.C. Official Code § 2-1219.18, which provides that any revenue bond issued by NCRC must contain a legend stating that the bonds are not the general obligation of the District and that the bonds are not secured by the District's full faith and credit. My staff has examined the Note and finds that it does not contain any such provision. Therefore, I believe the proper statutory procedures were not followed, the Note does not comply with the technical requirements of D.C. Official Code § 2-1219.18, and the loan has not been properly authorized by District law at this time.

Also, if government debt is not validly authorized, such *ultra vires* debt generally is void and unenforceable and loses its federal tax-exemption.[32] Because the bonds were not issued in compliance with either section 490 of the Home Rule Act or D.C. Official Code § 2-1219.18, the bonds did not receive the exemption from the appropriations requirement under section 446 of the Home Rule Act accorded to such properly issued bonds by section 490(f) of the Home Rule Act. Furthermore, because the bonds appear to have been issued for a period greater than one fiscal year without appropriations for payment thereof, the obligations incurred by the issue of the bonds, as well as payments made thereunder, in all probability violated both the Federal ADA and the D.C. ADA.

Despite the Note's non-compliance with certain provisions in D.C. Official Code § 2-1219.18, District law does not preclude reformation of the Note and Deed of Trust to comply with applicable law and subsequent ratification of the Note and Deed of Trust as revenue bonds, since the material terms of the loan appear to qualify as revenue bonds on a purely substantive review. Because the Note was required to be approved in the first instance by act of the Council in order to be properly authorized, the Council now must approve the project and a revised version of the Note and Deed of Trust by act, if it chooses to ratify the loan and render the loan documents valid and enforceable.

C. NCRC Lacks Authority to Establish Special Funds because Such Authority Cannot be Delegated by the Council (and, Therefore, Use of NCRC-created Special Funds to Secure Revenue Bonds is Impermissible)

1. Establishment of Special Funds

Council authorization to NCRC to establish special funds represents an impermissible attempt by the Council to delegate a non-delegable duty. Section 450 of the Home Rule Act provides: "The Council may from time to time establish such additional special funds as may be necessary for the efficient operation of the government of the District." *See* D.C. Official Code § 1-204.50 (2001). This provision grants the Council the authority to segregate funds from the General Fund, which is used to pay the operating expenses of the government. *Id.* However, the Council does not have the authority to delegate this power. Nevertheless, the Council, in the NCRC Statute, attempted not only to create a special fund in which NCRC could deposit certain monies and keep them separate from the General Fund, but to delegate to NCRC the ability to create additional special funds, separate and apart from the General Fund. *See* D.C. Official Code § 2-1219.17.

As noted above, this is an impermissible attempt to delegate a non-delegable duty. In *Hampton v. United States*, 276 U.S. 394, 405-06 (1928), the Supreme Court discusses the maxim "*Delegata potestas non potest delegari*," and explains that such maxim "is well understood and has had wider application in the construction of our Federal and State Constitutions than it has in private law," and that it is especially applicable to agency law. It is a breach of fundamental constitutional law if the legislative branch, in this case the Council, attempts to transfer its legislative authority to either of the other two branches of government. *Id.* Although the

[32] *See Scofield Engineering Co. v. City of Danville*, 35 F.Supp. 668 (W.D.Va. 1940), *aff'd* 126 F.2d 942 (4th Cir. 1942); *Chemical Bank v. Washington Public Power Supply*, 99 Wash. 2d 772, 666 P.2d 329 (1983).

separation of powers is not absolute, in "determining what it may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination." *Id.* at 406. The legislature may vest authority in the executive branch in some circumstances. *Id.* There is a strong distinction, however, between the power to make the law, deciding what the law will be, and conferring the authority to make a decision on how to execute that law. *Id.* at 407. Here, the Council did not respect this distinction when it passed D.C. Official Code § 2-1219.17.

Any attempt to interpret D.C. Official Code § 2-1219.17 as a directive to the executive to administer a legislative mandate is likely to fail given the open-ended nature of the mandate and the failure to specify any standards pursuant to which NCRC is to "implement" it. *See* D.C. Official Code § 2-1219.17. The plain language of the provision delegates to NCRC the Council's exclusive power to create special funds, and does so without limiting the number of special funds NCRC can create, or the purposes for which they can be created. *Id.* The procedures enacted for NCRC to establish funds are broadly written so as to have indiscernible boundaries. *Id.* NCRC has discretion as to whether or not it establishes additional special funds, and if so, how many and for what purposes. *Id.* By vesting such unbridled discretion in NCRC, the Council has clearly given legislative functions to a non-legislative authority. The Council has not merely "conferred upon [NCRC] an authority and discretion, to be exercised in the execution of the law, and under the pursuance of it, which is entirely permissible," but has "delegated to the [NCRC] any authority or discretion as to what the law shall be." *State v. Chicago, Milwaukee & St. Paul Railway Company*, 38 Minn. 281, 301 (1888). This delegation is a breach of the long-standing principle of separation of powers.

2. Accounting Control and Management of Funds

The CFO is charged in the Home Rule Act with: (i) maintaining custody of all public funds belonging to or under the control of the District, including all investment and invested funds of the District; (ii) supervising financial transactions to ensure adequate control of revenues and resources and to ensure that appropriations are not exceeded; and (iii) maintaining systems of accounting and internal control to provide, among other things, effective control over, and accountability for, all funds, property and other assets of the District government. *See* D.C. Official Code § 1-204.24(c) (2001). The Council does not have authority to limit CFO authority provided under the Home Rule Act; doing so (and in this case re-assigning such authority to NCRC) would violate the separation of powers doctrine. *See Wilson v. Kelly,* 615 A.2d 229, 231 (D.C. 1992); *see also*, D.C. Official Code § 1-301.44(b) (2001) (where the "Council recognizes the principle of separation of powers in the structure of the District of Columbia government."). Any such attempt to limit CFO authority would also be a clear violation of the plain language of the Home Rule Act. *See Wilson*, 615 A.2d at 231; *see also*, D.C. Official Code § 1-204.24(c). Therefore, to the extent that D.C. Official Code § 2-1219.17 is construed or implemented as giving NCRC custody and control over its funds in a manner that infringes on the duties and powers of the CFO, that provision is void as in conflict with the Home Rule Act.

* * *

If you have any questions concerning this memorandum, please don't hesitate to call me at 724-1520, Charles Barbera, Deputy Attorney General for the Commercial Division, at 442-9834, or Wayne Witkowski, Deputy Attorney General for the Legal Counsel Division, at 724-5524.

Sincerely,

Robert J. Spagnoletti

ROBERT J. SPAGNOLETTI
Attorney General

RJS/wcw, sbl, mjk, rlt, ajp

cc: Robert Bobb
City Administrator

Alfreda Davis
Chief of Staff to the Mayor

Len Becker
General Counsel to the Mayor

Stanley Jackson
Deputy Mayor for Planning & Economic Development

Natwar Gandhi
Chief Financial Officer

Ronald Evans
Chair, Board of Directors, National Capital Revitalization Corporation